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No. 90-213

In The

Supreme Court of the United States

October Term, 1990

LOUIS A. LaRAIA,

Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. STATEMENT OF THE CASE

Petitioner, Louis A. LaRaia, was charged with Cruelty to Animals under section 5511(a) of The Pa. Criminal Code (18P.S.5511(a)) for shooting and killing a Coon dog. After lengthy, painstaking and, in most cases, unnecessary pre-trial proceedings, LaRaia was tried before a jury on January 12 and 13, 1987. The jury found him guilty as charged. His post-trial motions were denied by an opinion of the trial Court, dated July 16, 1987. He was sentenced to probation and fine. A direct appeal to the Superior Court was denied on December 22, 1988. A petition for Allowance of Appeal to Pennsylvania Supreme Court was denied on March 19, 1990. A motion for reconsideration and request for change of venue for the purpose of filing pleadings for Post Trial Relief was denied on May 8, 1990. This petition followed in which LaRaia seeks review of the memorandum opinion of the Pa. Superior Court, dated December 22, 1988.

Prior to the jury trial, LaRaia filed a 42 U.S.C. 1983 Complaint in the United States District Court for the Western District of Pennsylvania at Docket No: 86-708. The cause of action as asserted in the Complaint was based on the facts and circumstances of this case. A number of Beaver County elected, nominated officials and private citizens were named as defendants in the complaint. LaRaia's suit was eventually dismissed by the District Court. LaRaia entered an appeal to the Third Circuit at No: 89-3042. Upon denial of said appeal, LaRaia filed a petition for Writ of Certiorari at No: 89-561 in this Honorable Court. Said petition was denied on November 13, 1989. A petition for rehearing was denied. The Citation of this Campanion Case is necessary for the reason that some of the issues LaRaia has raised here, are the same issues which were raised in LaRaia's petition at 89-561.

II. STATEMENT OF FACTS:

On November 29, 1985, James McClurg and two others were coon hunting in Hanover Township, Beaver County, Pennsylvania. each of the hunters had a Coon dog. McClurg's dog was a walker breed, about 24 inches high, 32 inches long and weighed about 40 pounds. McClurg had owned his dog for about two years. In his testimony McClurg had told the jury that he had hunted coon (raccoon) for 56 years and knew very well the different movements of a Coon dog, such as the sound of the Coon dog's bark when it is tracking or when it is treeing a coon.

The three hunters had hunted for about three hours when, about 10:30 P.M.; they heard McClurg's dog tracking a coon close to the public road and then across a corner of LaRaia's property, but still close to the public road. All of a sudden they heard a gun shot, immediately after that they could hear the dog yelping. Then they heard another gun shot, with that the dog's yelping stopped. The hunters called the police.

Officer Phillis of Hanover Township answered to the call. The police officer first talked to the coon hunters and then went to LaRaia's residence to investigate the gun shots. There were no lights on when the officer arrived at LaRaia's home. After knocking at the door several times LaRaia came to the door. When the officer asked if he had shot a dog, LaRaia replied that he had shot at something. Upon questioning LaRaia further explained that something was attacking his steer, he then turned on the flood light and saw some kind of stray or animal which was trying to get in the steer pen. He then went into the house, LaRaia continued, retrieved his shotgun and shot at the dog. During the trial, LaRaia told the jury, that his first shot was intended to frighten the dog, but it hit the rear of the dog. The dog, according to LaRaia, turned and started coming towards

where he was standing. LaRaia further stated that fearing that the dog would attack him, and knowing that the dog having sustained injury by the first shot and, therefore, intended to put the poor thing out of misery, LaRaia shot at the dog a second time. LaRaia told officer Phillis that after getting hit by the second gun shot the dog ran into the woods.

Officer Phillis then observed the area where the steer was fenced in. His investigation found that the steer was standing calm and still, there was no blood in the vicinity of the steer pen, about three foot high fence was intact, there was no sign that the fence was torn or bent down. The Coon dog, however, was found dead on the opposite side of LaRaia's house away from the steer pen.

III. REASONS WHY THE PETITION SHOULD BE DENIED:

(A) LaRaia failed to raise any issue which would qualify under 28 U.S.C. Rule 10. The opinion and order under review represents the applicable State and Federal precendents and is not in conflict with any such precedents. The memorandum opinion of the Court below was not published and carries no remarkable precedent and applies only to this case.

In his first issue LaRaia claims that under the rule of Holland vs. Illinois, ____US____, 110 Sct 803 (1990) he has standing to object Commonwealth's exercise of peremptory challenges to remove two prospective jurors, even though he is white. LaRaia then urges this Court, based on Holland, Supra, opinion, to vacate his conviction and judgement of sentence. This is simply absurd. The Holland rule, even if applicable, does not automatically entitle LaRaia to the relief he is requesting. The trial court refused this issue on the

basis of then applicable rule in Babson vs. Kentucky 476 U.S. 79, 106 Sct 1712 (1986). Mere existance of a reason to object exercise of prosecutor's peremptory challenge is not enough to justify the grant of a relief. It is held that in deciding whether the moving party has made the requisite showing, the trial Court must consider all the relevant circumstances. And if the showing is made, the trial Court then must undertake a factual inquiry which takes into account all possible explanatory factors in the particular case. The inquiry requires the party opposing the motion to submit neutral, non-discriminatory explanations for the exclusion of blacks. The trial Court then makes a factual finding. U.S. vs. Davis, 809 F. 2d 1194 (1987) also see Babson vs. Kentucky, supra. It is further held that a prosecutor meets his burden of proving that there has been no improper discrimination in the exercise of challenges against black jurors when he articulates legitimate non-discriminatory reason for the exercise of the peremptory challenges, U.S. Cartlidge, 808 F 2d 1064 (1987).

The learned trial Court followed the above noted procedure and found the prosecutor's explanation neutral and non-discriminatory. The trial Court, therefore, set forth in its opinion, that "In fact, the prosecutor did not even realize he had removed black venire members as he did not look at the panel while exercising peremptory challenges. He only looked at the book." (page 3 and 4)

LaRaia, however, failed to or, avoided to mention above noted portion of the trial Court's opinion. Further LaRaia failed to present the issue properly before the State Courts, in that the issue was not presented under equal protection clause of the Constitution.

(B) As pointed out in this brief, LaRaia presented his second issue before this Honorable Court in Petition For Writ

Of Certiorari at No: 89-561. Said petition arose out of a 42 U.S.C. 1983 complaint which was based on the facts and circumstances existed in the present case. The issue was first raised before the District Court which considered and denied the issue. The question was again raised before the Third Circuit, The Appellate Court refused the issue as well. Finally LaRaia raised virtually similar issues, as he has in his present brief, based on the same facts and grounds before this Court in Certiorari Petition at No: 89-561(see appendix A). The only difference is that in his prior petition LaRaia sought permission for discovery, for which he was granted a number of opportunities by the District Court to establish requisite showing for such relief, but he failed, here he is requesting to overturn his conviction. That in itself raises the question of legitimacy of this issue. If this issue required further information to substantiate it then it can not be proper issue for this court to view.

On the merit there is not even a single word in any record to substantiate this allegation. The issue has been manufactured, and has no foundation or truth to it. Further, the issue was not preserved properly and for this reason the Superior Court refused to rule on it.

(C) LaRaia's third issue raised herein was also presented before this Court in his Petition for Rehearing. After denial of his petition at 89-561 LaRaia filed a petition for rehearing. In his rehearing petition LaRaia raised two same issues which he has raised herein as issues II and III. (see Appendix B.) This Court, after consideration, denied LaRaia's petition for rehearing. It is, therefore, improper for LaRaia to present same issues all over again for the review.

On the merits this issue was raised and argued before the jury, and the jury heard the evidence. The jury, however, did not

agree with LaRaia's contention and convicted him. As the Superior Court pointed out that "There is no evidence in the record to support LaRaia's claim that he was prosecuted solely for the purpose of extorting money from him." (see App. 28 Petitioner's Brief), and that the charges were brought by the Commonwealth and not the victim. (see App. 27 Petitioner's Brief).

CONCLUSION

In view of the foregoing, it is respectfully prayed that this Petition For Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX "A"

It is Certified that following is the true and correct reproduction of pages 14 through 20 of the brief entered by the petitioner Louis A. LaRaia in Petition For Writ of Certiorari captioned Louis A. LaRaia vs. Robert Phillis, et al. at No: 89-561.

ARGUMENT

I. IF A STATE CRIMINAL DEFENDANT MAKES A PRIMA FACIE PRESENTATION THAT THE UNASSIGNED PRESIDENT JUDGE OF THE PROSECUTING COUNTY HAS SECRETLY MADE CONTACT ABOUT HIS CASE WITH THE HIGHEST STATE DECISION MAKER, DO THE FIRST, FIFTH, SIXTH AND FOURTEENTH AMENDMENTS PLUS THE SUPERVISORY AUTHORITY OF FEDERAL COURTS REQUIRE AN INQUIRY, AT THE DEFENDANT'S REQUEST, AS TO WHAT HE HAS DONE AND WHERE ELSE HE HAS ACTED AND, IF SO, SHOULD AN OUT OF CIRCUIT JUDICIAL OFFICER PRESIDE OVER THE PROCEEDING?

Defendents' "right to an impartial adjudication be it Judge or Jury" is guaranteed and taking it away can never be harmless error; *U.S. v. Gomez*, June 12, 1989, ____US____, 109 S. Ct. 2237, 2248.

President Judge Reed has admitted, through his Supreme Court of Pennsylvania supplied Counsel and on the District Court official record, that he at least sent one letter to its Justice Nicholas P. Papadakos who released Petitioner on May 2, 1986.

Since that time, the State's highest judicial court dismissed his previously pending petition protesting his Beaver County prosecution and has refused to further intervene.

Petitioner's attempts to even obtain a copy of the letter were rejected by President Judge Reed, the State Supreme Court, the District Court and the Circuit Court of Appeals.

Two levels of Fedeal Judges have refused to allow any type of discovery as to what other contacts the President Judge might have made, where he made them, including other state or federal courts, what he said or did at each point.

The District Court refused to have even a hearing to decide if future President Judge Reed similar activity should be enjoined and the Circuit Court of Appeals approved.

Petitioner respectfully suggests that if the admittedly sent letter was harmless, President Judge Reed would have disclosed it and that if he had not interfered in any other aspect of this case that he would have welcomed the opportunity to say so and lay this problem to rest rather than give Petitioner reason to complain.

However, the President Judge not only refused but resisted and Petitioner respectfully suggests that if the President Judge is allowed to prevail that a substantial and fundamental foundation of what is advertised to the world as accepted American jurisprudence has been demolition balled and the same goes for his secret consultations with Chief Deputy Sheriff Ralph Ramanna who was an active and interested police officer in this case from almost its beginning.

Secret input has always been condemned by Federal Courts; *Willner v. Committee on Character and Fitness,* 1963, 373 US 96, 101, 105-106, 83 S. Ct. 1175, 1179, 1181; *Greene v. McElroy,* 1959, 360 US 474, 479 and N. 25, 79 S. Ct. 1400, 1405 and N. 25; *Commonwealth Coatings Corp. v. Continental Casualty Co.,* 1968, 393 US 145, 150, 89 S. Ct. 337, 340; *Home Box*

Office v. F.C.C., 1977, C.A.D.C., 567 F.2d 9, 51 (ex parte contact with Commissioners); *Westinghouse Electric Corp. v. U.S. Nuclear Regulatory Commission*, 1977, C.A. 3, 555 F.2d 82, 95 (secret ex parte hearings condemned); *Mitchell v. Foster*, 1972, 407 US at 402, 92 S. Ct. at 2162 (42 USC 1983 covers judicial actions).

Ex parte judicial discussions, even if they have no effect, are universally condemned and may be subject to severe sanctions; *U.S. v. Kahaner*, 1963, C.A.2, 317 F.2d 549 (Judge who attempted to influence another Judge convicted of obstructing justice); *U.S. v. Manton*, ____, C.A.2, 107 F.2d 834, 836 (fact decision correct irrelevant); *Hastings, Judge, v. Judicial Conference of the U.S.*, 1987, C.A.D.C., 829 F.2d 91, 95, N. 12 (ex parte contact with law clerks); *U.S. v. Holzer, 1987*, C.A.7, 816 F.2d 304 (Judge has affirmative duty to disclose); *Tower v. Glover*, 1984, 467 US at 914, 104 S. Ct. 2820 (when a non-immune person conspires with an immune Judge liability attaches); *King v. Love*, 1985, C.A. 6, 766 F.2d 962 (Judge causes rearrest after Defendant discharged); *Sevier v. Turner*, 1984, C.A. 6, 742 F.2d 262, 275 (non-support Judge orders criminal proceedings as a pressure to enforce civil obligation); *Whittaker-Merrill Co. v. Profit Counsellors, Inc.*, 1984, C.A. 8, 748 F.2d 354, 359 (no more ex parte briefs); *Judicial Inquiry and Review Board v. Snyder*, 1987, ____Pa____, 523 A.2d 294, 298 (ex parte Judge-Lawyer discussion); *Judicial Review Board v. Fink*, 1987, ____Pa____, 532 A.2d 358, 361 (ex parte judicial meeting with only one lawyer).

Since judicial office is no insulation from criticism, *In Re Snyder*, 1985, 472 US 634, 646, 105 S. Ct. 2874, 2882, *Landmark Communications, Inc. V. Virginia*, 1978, 435 US 829, 889, 98 S. Ct. 1535, 1541 cited with approval in *Larsen v. Phila. Newspapers*, 1988, ____Pa. Super.____, 543 A.2d 1181, 1184 and all persons including the President are subject to subpoena; *U.S. v. Nixon*, 1974, 94 S. Ct. 3090, 3104, 3108, 418 US 683, 702, 709; *U.S. v. Burr*, 1807, 25 Fed. Cases 187 approved, *U.S. v. Valenzuela-*

Bernal, 1982, 458 US 858, 870 N.8, 102 S. Ct. 3440, 3448, N.8, Petitioner respectfully suggests his limited inquiry about what President Judge Reed did in his cases should have been allowed especially when its refusal might be a Sixth Amendment refusal of guaranteed compulsory process and a Fifth Amendment denial of due process, *Valenzuela-Bernal,* supra.

Since Petitioner never saw the letter, he could not make arguments about what it contained, *Valenzuela-Bernal,* supra, N.8 (see also N.2 at 102 S. at Page 3452, 458 US at Page 878 where Justice O'Connor discusses application of supervisory power).

Petitioner respectfully suggests application of *Vasquez v. Hillery,* 1986, 474 US 254, 263, 106 S. Ct. 617, 623 and *Wheat v. U.S.,* 1988,____US____, 108 S. Ct. 1692, 1697 (proceedings must appear fair to those who observe them.)

In addition, Petitioner can find no United States Supreme Court case where what has happened here is adjudicated so the facts present a case of first impression which justifies the grant of certiorari; *Schlagenhauf v. Holder,* 1964, 379 US 104, 110, 86 S. Ct. 234, 238.

Petitioner recognized the problem of finding out what a sitting Judge has done plus its diplomatic and jeopardy risks to both himself and his Counsel in even presenting the issue.

They decided the best idea was to ask newly appointed and here Judge Smith to wipe the slate clean; *Arizona v. California,* 1983, 460 US 605, 618-619 and N.8, 103 S. Ct. 1382, 1391 and N.8; *State Automobile Insurance Assn. v. Young Men's Republican Club of Allegheny County,* 1987, W.D. Pa., 663 F. Supp. 1077; *Schultz v. Oman Corp.,* 1987, C.A. 3, 737 F.2d 339, citing *Arizona*, supra, with approval, and begin procedures to bring in an out of Circuit Jurist who would not have to see President Judge Reed after this case was over.

So, he asked Judge Smith to begin 28 USC 292 (c), 294 (a) and (d), 295 and 296 procedures to have the Chief Justice bring in an out of Circuit Jurist to make the future decisions.

This legislation provides, in relevant part, for the following procedures:

28 USC 292 (c) directs: "The Chief Justice of the United States may designate and assign temporarily a District Judge of one Circuit for service in another Circuit, either in a District Court or Court of Appeals, upon presentation of a certificate of necessity by the Chief Judge or Circuit Justice of the Circuit wherein the need arises."

28 USC 294 (a) advises "Any retired Chief Justice of the United States or Associate Justice of the Supreme Court may be designated and assigned by the Chief Justice of the United States to perform such Judicial Duties in any Circuit, including those of a Circuit Justice as he is willing to undertake."

28 USC 294 (d) explains that a retired Judge can be assigned by the Chief Justice "outside his own Circuit" "upon presentation of a certificate of necessity by the Chief Judge or Circuit Justice wherein the need arises-"

28 USC 295 restricts assignment of an active Judge out of Circuit unless the Chief Justice or Judicial Counsel of the Assignor Circuit agrees.

28 USC 292 (d), Pocket Parts, directs "the Chief Justice of the United States may designate and assign temporarily a District Judge of one Circuit for service in another Circuit, either in a District Court or a Court of Appeals, upon presentation of a certificate of necessity by the Chief Judge or Justice of the Circuit where the need arises."

28 USC 296 then gives the assigned Jurist full power. Petitioner can find no relevant cases discussing the scope of this procedure although it was used in *Centifranti v. Nix,* January 20, 1989, C.A.3, 865 F.2d 1422, 1428, N.6.

Petitioner respectfully suggests that if an out of Circuit Judge or a retired Supreme Court Justice had been appointed on his Motion that an impartial viewer of the case would feel more at ease with present result and now asks the clean slate request be granted and such a Jurist appointed to write upon it.

APPENDIX B

It is certified that following is the true and correct reproduction of the pages 2 through 5 of the Petition For Rehearing entered in Re: Petition For Writ of Certiorari captioned Louis A. LaRaia vs. Robert Phillis, et.-al. at No: 89-561.

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WHEN THE SECRET CONDUCT OF A JUDGE IS QUESTIONED, DOES THE LAW, APPLICABLE TO ALL OTHER LITIGANTS, STILL APPLY?

6. Petitioner received two years probation for shooting a hunting dog at 10:30 PM on his own posted against trespass rural and secluded property after it first attempted to attack his prize steer and then, after accidental wounding, was proceeding to attack him.

7. He was fined $5,000 by the Trial Judge because he had presented a vigorous defense.

A. The Trial Judge actually said (September 16, 1987,

Page 45 of testimony notes, record 782-a, 783-a) "because of the large number of spurious motions and petitions that were filed not only in this case but in what might be termed companion type litigation and I thought and I still think that parties and lawyers need to be discouraged from wasting the court's time and wasting the taxpayer's money."

B. The above mentioned motions included objections (in state and federal courts) to the in camera activity of the Court's President Judge and his refusal to advise exactly what he had done.

8. Petitioner had the misfortune, in his opinion, to have been caught in an accepted by court and prosecutor shakedown racket and to have suffered the retaliation of the entire county power establishment for resisting a payoff.

A. The alleged dog owner admitted (353-a to 356-a) that he brought the prosecution for the sole purpose of collecting $10,000 for a dog he purchased 2 years earlier for $200 (709-a, 726-a) and would withdraw it (353-a to 355-a) if Petitioner paid him that amount.

"A. That's the idea. That's why we are here, to pay me for my dog."

"Q. You tried to shake him down for $5,000, didn't you, Mr. McClurg?

A. Shake who?

Q. Mr. LaRaia.

A. That's half of it. Say ten."

"Q. If he gave you $10,000 you would drop the charges right now, wouldn't you?

A. Ten Thousand, right." (Testimony, T86 - T89; 353 - a to 356 - a).

B. When Petitioner protested this abuse, the District Attorney objected (T39, T40; 233-a to 240a) and the Trial Judge said inter alia "I don't think that if there was such a discussion it would be an unusual thing because it happens in almost every case."

9. This Court has always condemned secret input; *Willner v. Committee on Character and Fitness,* 1963, 373 US 96, 101, 105-6, 83 S. Ct. 1175, 1179, 1181; *Greene v. McElroy,* 1959, 360 US 474, 479, 79 S. Ct. 1400, 1405, but Petitioner can find no case where it advised if the prohibition extends to Judges.

10. Pennsylvania Courts have warned about the severe financial sanction when a Judge is criticized; *P.G. Publishing Co. etc. v. DiSalle,* ____, 544 A.2d 1345, 375 Pa. Super. 510, ____ Pa ____, 557 A.2d 724; certiorari denied June 26, 1989, ____ US ____, 109 S. Ct. 3216 ($2,000,000 punitive damages); *Larsen v. Philadelphia newspapers, Inc. and Pgh. Post-Gazette,* 1988, ____ Pa. Super. ____ 543 A.2d 1181, 1189 (putting Supreme Court Justice in false light).

11. Although Beaver County President Judge Reed admits to *at least* sending a letter to the Pennsylvania Supreme Court, he refuses to produce it or discuss any other activity and the Media are aware of his conduct, nothing has appeared on the air, television or print about it. When Scripps-Howard, Washington D.C. Supreme Court of the United States Reporter Lee Bowman did a writeup after the November 13, 1989 denial of certiorari, the Pittsburgh Press refused to print it.

12. Petitioner is aware of the reassuring protections of cases like *Young ex rel Vuitton et Fils, S.A.*, 1987, ____ US____, 107 S. Ct. 2124, 2139 and *Wheat v. U.S.*, 1988, ____US ____, 108 S. Ct. 1692, 1697 and *Tennessee Valley Authority v. Hill, Jr.*, 1978, 437 US 153, 194-5, 98 S. Ct. 2279, 2302 and *Powell v. McCormick*, 1969, 89 S. Ct. 1944, 1969, N.60, 395 US 486, 531 but he respectfully asks if that thinking applies when a Judge's conduct enters the picture.

13. Petitioner respectfully argues that nothing could be of higher public interest than this issue because if the Bar and litigants are advised to forget objection if a Judge's secret behind the scenes activity is involved that a great amount of legal work, hurt feelings, risk of judicial retaliation, briefs and court time will be saved.

14. Petitioner realizes that this court rightly announces the law and accedes to its determinations but he respectfully requests a clear statement if Jurist conduct is excluded in a secret situation even though it is not in one that is open; *Mitchum v. Foster*, 1972, 407 US at 402, 92 S. Ct. at 2162.

Respectfully submitted,

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